

2008

State of Utah v. Roger Allen Malcolm : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
ROGER ALLEN MALCOLM, : Case No. 20080781-CA
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a conviction of murder, a first degree felony under Utah Code Ann. §§ 76-5-201 (2003) and 76-5-203 (Supp. 2007), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Paul G. Maughan, presiding.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
Plaintiff/Appellee, :
v. :
ROGER ALLEN MALCOLM, : Case No. 20080781-CA
Defendant/Appellant. :

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2008). The trial court entered judgment and conviction against Roger Allen Malcolm for murder, a first degree felony under Utah Code Ann. §§ 76-5-201 (2003) and 76-5-203 (Supp. 2007). (*See* R. 219-20). The judgment is attached as Addendum A.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Whether the trial court erred when it failed to instruct the jury on important concepts going to Malcolm's theory of the case as supported by the law and the evidence.

Standard of Review: This Court reviews a trial court's refusal to give jury instructions for correctness, providing no deference to the trial court's ruling. *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992). Also, in considering whether a defendant was entitled to have the jury instructed on his defense, this Court will view the evidence and inferences that can be drawn from the evidence "in the light most favorable to the defense." *State v. Spillers*, 2007 UT 13, ¶ 10, 152 P.2d 315.

Preservation: The issue was preserved in the record at 139-40; 207:388-98.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions are relevant to the issue on appeal and set forth at Addendum B: Utah Code Ann. §§ 76-5-201 (2003); 76-5-203 (Supp. 2007); 76-2-403 (2008); and 76-2-406 (2008).

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, Disposition in the Court Below

On December 28, 2007, the State charged Malcolm with murder, a first degree felony offense. (R. 1-3). On April 2, 2008, the court conducted a preliminary hearing and bound Malcolm over for trial on the charge. (R. 29-30).

On June 23, 2008, the trial court presided over the jury selection process for the three-day trial. (See R. 92-93; see also R. 104-09; 141-45; 153-54). On June 26, the jury found Malcolm guilty as charged. (R. 153-54, 202-04). On August 25, 2008, the trial court sentenced Malcolm to a prison term of 15 years to life. (R. 219-20). On September 4, 2008, Malcolm filed a notice of appeal. (R. 221). The appeal is timely. See Utah R. App. P. 3 & 4 (2008). Malcolm is incarcerated.

STATEMENT OF FACTS

On the afternoon of December 26, 2007, Malcolm stopped at Sapp Brothers Truck Stop on California Avenue in Salt Lake City on his way to work. (See R. 207:452; 206:169 (identifying address)). He bought a sandwich from the Burger King inside the store, and he planned to buy a package of Orbit sweet mint gum from the convenience store. (See R. 207:453-54; see also 206:75 (stating the truck stop includes a convenience

store, two restaurants – a Burger King and a Great American Restaurant – a dentist’s office, and a chiropractor’s office); 206:78 (stating Malcolm was at the counter with a package of gum)). As Malcolm stood in line to pay for the gum, he realized the cashier in front of him was not helping customers. (R. 207:454-55; see also 206:117-18 (Chad Hinton also stood in line behind Malcolm without realizing the register was closed); 206:137-38 (stating a line appeared to form in front of a closed cash register)).

Witnesses testified that Malcolm became agitated or flustered (R. 206:118, 138), and he asked, “[D]o I need to stand over in that line?” referring to another cash register. (R. 207:455-46; see also 206:78-79, 95, 101 (stating Malcolm was disruptive, loud, and a little obnoxious); 206:139 (stating Malcolm was “talking kind of loudly and aggressively”); 206:146 (stating Malcolm asked, “Why can’t I get any service around here?”); 206:155 (stating Malcolm was loud and belligerent); 206:171). Cashier Jodie Neeley responded, “No, just wait one minute. We will be right with you.” (R. 206:78). As a second cashier, Kaylene Allred, went to help Malcolm, the security guard Verne Jenkins stopped her and said, “No, not until he changes his attitude.” (R. 206:78, 79, 95, 102; see 207:456-57; see also 206:102 (stating Verne asked Malcolm to apologize); 206:109-10 (stating Verne took the gum and kept it)).

Verne was wearing a uniform, badge and utility belt with flashlight, handcuffs and pepper spray. (See R. 206:210, 248). He told Malcolm to leave. (R. 206:79, 103 (stating Verne “didn’t raise his voice”; he was mellow and stern); see also 206:97-98 (stating Malcolm may have said, “All this is just for a piece of gum. All I want is gum.” And Verne said, “No, you are being rude. You need to leave.”); 206:141-42 (stating Verne

asked Malcolm to calm down or leave, and he used an authoritative tone); 207:457 (Malcolm did not recall that Verne said anything)). Malcolm began to leave (R. 207:457-58) when Verne “grabbed” or restrained him by the shoulder. (R. 206:79-80, 93, 146-47; 207:458-59, 483-84).

Malcolm pulled away (R. 206:94) and continued to the Burger King area for his bicycle. (See R. 206:129 (stating Malcolm was trying leave); 206:132, 202; 207:459). At that point, the men became involved in a struggle or a scuffle. (R. 206:80; 206:90; see also 206:104, 111 (Kaylene Allred stated the men were involved in a struggle and she heard the clang of a bike); 206:142-43, 147 (David Robison stated Malcolm went over to his bike and Verne grabbed him by the shoulder and the men “got in a scuffle”; also it looked like Malcolm tried to use his bike to make contact with Verne and to push Verne “off him”); 206:157-58 (Tyson Troxel stated the struggle started when “Vern[e] was trying to get his hands on [Malcolm]” to get him out of the store; also Verne had his arm in front of Malcolm’s chest); 206:215-16 (Bryant Brown heard two men fighting)); (but see R. 206:172, 185 (Nicholas Moore claimed Malcolm grabbed the security guard); see also 206:174 (Moore did not “actually see” the fight begin; he “heard it” and “looked up”); 206:173-74 (Moore claimed Malcolm hit the guard in the jaw or face; also he acknowledged he did not actually see who hit whom, but he assumed Verne “probably got hit”); 206:183-84 (Moore acknowledged inconsistencies between his statements at trial and statements to police); 206:239 (Chance Hoover testified that Moore had his back to the individuals during the scuffle)).

Witnesses testified that Verne had Malcolm in a headlock or chokehold (R. 206:

120, 125, 127, 131 (describing a headlock); 206:158 (describing Verne as starting the struggle; also stating Verne was placing his arms in front of Malcolm's chest)), and punches were thrown. (R. 206:80, 90-91, 94 (stating punches were thrown); 206:158-59 (stating Malcolm hit Verne with the bike at least once)). Malcolm may have told Verne to get off him. (R. 206:182, 202, 216; 207:459). And Verne may have told Malcolm to cooperate and calm down. (R. 206:182).

Also, Verne threw Malcolm to the ground and was on top of him. (R. 207:460, 485-86; 206:125 (Chad Hinton stated Verne was "trying to take the customer down"); 206:144 (David Robison stated the men "seemed to fall"); 206:159, 165 (Tyson Troxel stated the men were on the ground with Verne on top); 206:200, 201-03 (Lester Huff stated he "thought a cop or something [was] taking down somebody"); 206:229 (Chance Hoover testified that "it looked more like the security guard was trying to upper hand the situation" to get Malcolm "down on the ground"); 206:174 (Nicholas Moore claimed Verne took Malcolm to the ground "a couple of times" and Malcolm "popped right back up"); see also R. 207:310, 328, 474 (stating Verne was 31 years old and weighed 214 pounds; Malcolm was 51 years old and weighed 180 pounds)). Malcolm had abrasions on his shin, knee and face, an eye injury, and red marks on his abdomen. (R. 207:430, 434-35, 440-41).

Malcolm testified that when Verne was on top of him, he felt attacked. (See R. 207:447-48, 460-61). He thought Verne had a gun and was going for it. (R. 207:447-48, 449; see also 207:491-92 (stating he saw the gun belt but could not recall if he saw the security guard's gun); 206:149 (a witness thought it was possible that Verne was armed)).

Malcolm drew his gun from a waistband holster and intended to fire a shot to warn Verne. (R. 207:447-48, 463, 486). He thought the safety was collapsed or disengaged. (R. 207:487). However, it was on, resulting in more force to squeeze the trigger than he anticipated. (See R. 207:448, 463-64, 487-89; see also 207:432 (stating the gun takes a good deal of pressure to release the safety and fire)). He fired the shot and it struck Verne. (R. 207:463-64).

According to the deputy medical examiner, the projectile traveled horizontally through Verne's neck. (R. 207:318-19, 323-24 (also stating the weapon was at least two feet from the point of entry)). The shot was fatal. (See R. 207:313, 319, 321, 325). Verne collapsed on top of Malcolm. Malcolm pushed Verne off (R. 206:160-61; 207:464), stood up, set the gun on a table or chair, and sat down to wait for police. (R. 206:162; 207:464-65). Malcolm testified that during the encounter with Verne, he was prepared to shoot the gun but he did not intend to kill Verne. (See R. 207:466, 496-97; see also 207:473 (stating "you have to really be in a life-threatening situation" to use a gun); 207:498).

Witnesses provided conflicting information as to what, if anything, Malcolm said after the encounter. (See R. 206:108, 113 (Kaylene Allred claimed Malcolm said Verne "deserved it, and so what?"; also, Malcolm had an indifferent look on his face); 206:144, 148-49 (David Robison testified that Malcolm looked shocked, exhausted, "a bit dazed," and out of it); 206:162-63, 219, 242 (Tyson Troxel, Bryant Brown and Chance Hoover heard Malcolm say something about a pack of gum); 206:175-76, 181, 190 (Nicholas Moore testified that Malcolm looked like he was hurt and almost in shock; he was

mumbling and said , “I can’t believe this is all over a pack of gum” and he may have called the security guard “an animal or something”); 206:211 (according to Lester Huff Malcolm said, “He should have let me go”); 206:252, 257 (Angela Simister testified that Malcolm said “Only once is all it takes,” and his demeanor was smug); 206:267, 272, 273 (William Clayton claimed Malcolm said, “The son of a b----- wouldn’t quit hitting me,” and he was calm; also Clayton asked Malcolm “how many times he shot the guy,” and Malcolm answered “once”); 206:284 (Regina Crookston testified that Malcolm stated Verne wanted to see his gun, and he “kept coming at me. What did he want me to do?”); 206:291, 294 (according to Amy Starks, Malcolm said, “I shot the bastard,” and he was cold and matter of fact); 207:466 (Malcolm testified that he said, “Yeah, that’s my gun,” and it was “all over a pack of g----- chewing gum”)).

A former medic assistant, William Clayton, rushed to Verne and began first aid (R. 206:263-64, 265; see 206:252), while shift manager Amy Starks went to Malcolm and screamed at him. (R. 206:162-63, 178-79, 255-56). He screamed back and called her “an idiot and moron.” (R. 206:163; see also 206:292-93); (but see R. 206:204, 224-25 (Lester Huff and Bryant Brown stated Malcolm got up when the person started yelling at him, then he sat down)).

When officers arrived, Malcolm was calm and cooperative until they placed handcuffs on him. (See R. 207:404-05, 414). Officers testified that Malcolm became verbal and vulgar when restrained. (See R. 207:406-08; see also 207:414, 421 (specifying that Malcolm was never physically resistant)). He told them to “[s]top hitting me.” (R. 206:285). He responded with vulgarities when officers asked his name. (R.

207:380-81). He was aggressive and agitated and he yelled at officers when they searched him. (R. 207:418, 419). He was verbally argumentative and vulgar while in the patrol car and at the police station. (R. 207:410, 420; see also 207:423-24 (stating he was placed in an observation room at the police station and was angry and yelling)). He was belligerent and uncooperative when officers tried to swab his face for blood and take photos. (R. 207:385, 411, 495). He was “verbally argument[at]ive, up until the point where he was taken out of handcuffs, and then he became once again very compliant.” (R. 207:412). Officers also testified that Malcolm made a statement “that he was acting in self-defense.” (R. 207:415).

The State presented evidence through several witnesses concerning the layout of the truck stop (see, e.g., R. 206:84-89 (State’s Exhibit 14); 206:105-07 (State’s Exhibit 15); 206:121-26 (State’s Exhibit 16); 206:136-37 (State’s Exhibit 17); 206:234-37 (State’s Exhibit 21)), and it presented a DVD with images from security monitors. (See R. 206:298-99 (stating officers reviewed the video and requested only certain clips); 207:346-49 (State’s Exhibit 25); see also 207:358-59 (Defense Exhibits 1-52)). After the jury deliberated the evidence, it found Malcolm guilty of murder. (R. 208:576-77).

SUMMARY OF THE ARGUMENT

The defense requested instructions at trial for extreme-emotional-distress manslaughter and imperfect-legal-justification manslaughter. Those forms of manslaughter may apply if the circumstances support that prior to the shooting a reasonable person in the defendant’s position would suffer distress; and/or if the circumstances support that a reasonable person in the defendant’s position would believe he was entitled to defend

himself, although he may not be entitled to use deadly force. The evidence here supported both forms of manslaughter. Consequently, the trial court allowed the instructions. However, the trial court refused to instruct the jury on the use of force under the law to effect a citizen's arrest or to expel someone from property.

Yet those instructions have a factual interconnection to the manslaughter alternatives at issue. Specifically, the facts support that the security guard, Verne Jenkins, used force to make a citizen's arrest against Malcolm and to expel him from the property. The evidence created a question of fact for the jury as to whether Verne's use of force was justified or unjustified and thereby provoked Malcolm into a physical confrontation. Where the evidence supported Verne's unjustified provocation, the jury also could find that such conduct would cause the reasonable person in Malcolm's position to suffer overwhelming distress, and it would cause the reasonable person to believe he was entitled to defend himself, although he may not be entitled to use deadly force. The evidence would support manslaughter. Since the trial court refused to instruct the jury on the relevant law, it effectively prevented the jury from resolving an important issue in the case: whether Verne unlawfully provoked Malcolm. The trial court's ruling resulted in prejudicial error. Malcolm respectfully requests that this Court reverse the conviction and remand the case for a new trial with the proper jury instructions.

ARGUMENT

A DEFENDANT IS ENTITLED TO HAVE THE JURY INSTRUCTED ON HIS THEORY OF THE CASE.

Malcolm requested instructions that would assist the jury in deciding whether the defenses of extreme-emotional-distress manslaughter or imperfect-legal-justification manslaughter should apply. (*See* R. 139-40; 207:388-90, 397-98). The trial court rejected the instructions. (*See* R. 207:388-98) (attached hereto as Addendum C). The trial court erred.

Under Utah law, and as a matter of fundamental fairness, a defendant has the right to have his “theory of the case presented to the jury in a clear and understandable way.” *State v. Potter*, 627 P.2d 75, 78 (Utah 1981); *see also State v. Castillo*, 457 P.2d 618, 620 (Utah 1969) (stating a defendant is entitled to have the jury instructed “fully and clearly” on the law of his defense); *State v. Garcia*, 2001 UT App 19, ¶¶ 8-9, 18 P.3d 1123 (recognizing that even where evidence is in conflict, the defendant is entitled to self-defense instructions); *State v. Ontiveros*, 835 P.2d 201, 205 (Utah Ct. App. 1992) (stating the defendant has a right to have his/her “theory of the case presented to the jury in a clear and comprehensible manner”); *State v. Aly*, 782 P.2d 549, 550 (Utah Ct. App. 1989) (stating “[a] criminal defendant is entitled to have the gist of his defense reflected in the instructions given to the jury, and the instructions should not incorrectly or misleadingly state the material rules of law”); *Jorgensen v. Issa*, 739 P.2d 80, 82 (Utah Ct. App. 1987) (stating “[a] party is clearly entitled to have the jury instructed on his theory of the case”); Utah Const. art. I, § 7 (ensuring due process); U.S. Const. amend. XIV, § 1 (same).

Likewise, the trial court “has a duty to instruct the jury on the relevant law.” State v. Low, 2008 UT 58, ¶ 27, 192 P.3d 867; *see also* Hamilton, 827 P.2d at 238 (stating the trial court has the duty “to instruct the jury on the law applicable” to the case). “The purpose of the instructions is to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities.” State v. Torres, 619 P.2d 694, 696 (Utah 1980).

The instructions must be supported by the evidence, whether the evidence has been presented “by the prosecution or by the defendant.” Low, 2008 UT 58, ¶ 25 (citing State v. Knoll, 712 P.2d 211, 214 (Utah 1985); Torres, 619 P.2d at 695).

If the instruction charge as a whole already addresses the relevant concepts, the trial court may refuse to give the defendant’s requested instructions to the jury. *See* State v. Sessions, 645 P.2d 643, 647 (Utah 1982) (stating “[i]t is not error to refuse a proposed instruction if the point is properly covered in the other instructions”); Ontiveros, 835 P.2d at 205 (stating the court will affirm on review “when the jury instructions taken as a whole fairly instruct the jury on the law applicable to the case”).

Also, the Utah Supreme Court has specified that under the harmless-error doctrine or the prejudice prong it will assess whether “‘an element of the crime . . . is in dispute’” and whether the “‘evidence is consistent with both the defendant’s and the State’s theory of the case.’” Spillers, 2007 UT 13, ¶ 24 (ellipsis in original; quoting State v. Knight, 2003 UT App 354, ¶ 17, 79 P.3d 969). In those circumstances, the trial court’s failure to give the defendant’s requested jury instructions is prejudicial: “‘failing to instruct on the lesser included offense presumptively affects the outcome of the trial . . . [and] our

confidence in the verdict is undermined.”” *Id.* (ellipsis in original; quoting *Knight*, 2003 UT App 354, ¶ 17); *see also Potter*, 627 P.2d at 78 (stating defendant was denied a fair trial “on the critical issues of the case” where the instructions were “so general” they “could have misled and confused the jury”).

A. MALCOLM’S REQUESTED INSTRUCTIONS ARE SUPPORTED BY THE LAW.

Malcolm asked the trial court to instruct the jury on a person’s use of force to make a citizen’s arrest, and on a person’s use of force to protect property. The proposed instruction for a person’s use of force for an arrest stated the following:

Any person is justified in using reasonable force, except deadly force, which he reasonably believes is necessary to effect an arrest. However, the person does so at his own peril [inasmuch as] the arrest must be legal. If the arrest is determined to be invalid or is without legal justification, the person making the arrest loses this justification and may be subject to criminal prosecution for, amongst other charges, unlawful detention and assault. Depending on the circumstances, the person making the illegal arrest could be charged with aggravated assault.

(R. 139; 207:389-90) (attached as Addendum D). Malcolm’s requested instruction is supported by the law.

Specifically, the first sentence is contained in the Utah Code: Section 76-2-403 defines a defense to criminal prosecution. It states that a person “is justified in using any force, except deadly force, which he reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest.” Utah Code Ann. § 76-2-403 (2008); *see also* Utah Code Ann. §§ 76-2-401(1) to 76-2-407 (2008) (identifying additional defenses available in a criminal prosecution). Since the code contemplates that a person using force for a citizen’s arrest may be charged with a

crime – and therefore entitled to assert the defense – it stands to reason that a person making such an arrest does so at his own peril and at the risk of being charged.

Under Utah law, a private person – *i.e.*, a security guard – has the right “to make a citizen's arrest in narrowly defined circumstances.” *State v. Quada*, 918 P.2d 883, 887 (Utah Ct. App. 1996); *see also* Utah Code Ann. § 77-7-3(2008) (stating a “private person may arrest another” for an offense committed or attempted in his presence). In *State v. Quada*, the defendant “was awakened by the sound of birdshot hitting the siding of his residence.” 918 P.2d at 885. The defendant grabbed a weapon, went outside, and hollered at the shooter, Bridger. *Id.* When Bridger failed to respond, the defendant fired two rounds “sighting off 15 feet from where Bridger was walking.” *Id.* Bridger turned around and the defendant instructed him to place his hands over his head. *Id.* Bridger’s father became involved and defendant instructed him to place his hands in the air. *Id.* Defendant ultimately was arrested and charged with two counts of aggravated assault for use of a dangerous weapon likely to produce death or serious injury. *Id.* The jury convicted as charged and defendant appealed claiming he was entitled to an instruction on a person’s use of force to effect an arrest. *Id.* at 886-87. This Court disagreed.

It ruled that based on the circumstances of the charged offense, the jury found that “defendant used a dangerous weapon likely to produce death or serious bodily injury.” *Id.* at 887. Thus, it found that defendant used ““deadly force.”” *Id.* (citation omitted). Since the defense of a citizen’s arrest does not apply in situations where the actor has used deadly force, *see* Utah Code Ann. § 76-2-403, the defendant in *Quada* would not be entitled to an instruction on the matter. *Quada*, 918 P.2d at 887.

Under the reasoning of Quada, the statutory use of force to make an arrest may apply if the force at issue does not constitute aggravated assault with a dangerous weapon or deadly force. See id. Indeed, the *underlying force for the arrest* may give rise to a charge for a lesser offense: *i.e.*, assault or unlawful detention. See Utah Code Ann. §§ 76-5-102 (2008) (defining assault as an attempt or threat to do injury with unlawful force or violence, or an act of unlawful force or violence for injury to another); 76-5-304 (2008) (defining unlawful detention as detaining or restraining a victim intentionally or knowingly, without authority of law, and against the victim's will).

Thus, if a private person uses force to make an arrest, he may be subject to criminal prosecution for assault or unlawful detention, and he may assert the defense. See Utah Code Ann. § 76-2-403. Moreover, if the private person has engaged in conduct for the citizen's arrest that amounts to aggravated assault, the person may not rely on the defense at § 76-2-403 as justification for his conduct. See Quada, 918 P.2d at 887. Those concepts were set forth in Malcolm's instruction for a person's use of force to make an arrest. (R. 139 (setting forth statutory language for a person's use of force to effect an arrest; specifying that a private person making an arrest does so at his own peril since he may be subject to criminal prosecution; stating that if a citizen's arrest is invalid or without justification, the person making the arrest may face prosecution for unlawful detention and assault, among other charges; and depending on the circumstances, a person purportedly making an arrest may be charged with aggravated assault)).

Next, Malcolm proposed the following instruction for a person's use of force to protect property.

A person is justified in using reasonable force, other than deadly force, against another, when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

- 1) lawfully in his possession; or
- 2) belonging to a person whose property he has a legal duty to protect.

However, a person may only use force to remove the person from real property if the person to be removed refuses to leave, damages property, or threatens the safety of others.

(R. 140; 207:397-98) (attached as Addendum E). Malcolm's requested instruction is supported by the law. The first paragraph parrots language from Utah Code Ann. § 76-2-406. The section states the following:

A person is justified in using force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

- (1) Lawfully in his possession; or

*

*

*

- (3) Belonging to a person whose property he has a legal duty to protect.

Utah Code Ann. § 76-2-406 (2008).

The second paragraph describes criminal interference: that is, instances when force may be justified to expel another from property. *See id.* Criminal interference may include trespass, criminal mischief, or the like. *See, e.g., Griego v. Wilson*, 570 P.2d 612, 613 (N.M. Ct. App. 1977) (upholding the trial court's findings that a business proprietor was justified in restraining a customer after cautioning him to stop; the customer was angry, abusive, and obscene, and he advanced on an employee causing the proprietor to be apprehensive that the customer was "about to attack" the employee); *Watkins v. Sears Roebuch & Co.*, 735 N.Y.S.2d 75 (N.Y. App. Div. 1. 2001) (recognizing that a security guard may use non-deadly force against a shoplifter); *Scheufele v. Newman*, 210 P.2d

573, 576 (Or. 1949) (recognizing that “[a] person aggrieved by a trespasser may repel the intruder by such force as may be reasonably necessary” and specifying when the aggrieved party may use a weapon) (citations omitted).

Under Utah law, trespass occurs when an actor enters or remains unlawfully on property with the intent to cause annoyance or injury, with the intent to damage property or to commit a crime, or with recklessness as to whether his presence will cause fear for the safety of another. Utah Code Ann. § 76-6-206(2) (2008). That offense may qualify as “criminal interference with [] property.” Utah Code Ann. 76-2-406; see also id. at § 76-6-106 (2008) (defining criminal mischief where the actor damages, defaces or destroys property, or tampers with property thereby recklessly endangering life or safety).

Where the law allows an actor to use force against a person to prevent or terminate criminal interference – including trespass where the person remains on property to cause annoyance, to damage property, or to threaten the safety of others, see Utah Code Ann. § 76-6-206(2) – those concepts were set forth in Malcolm’s requested instruction. (R. 140 (setting forth statutory language for use of force to protect property, and specifying that a person is justified in using such force when another has engaged in conduct constituting trespass)). In this case, neither the prosecutor nor the trial court disputed any specific part of Malcolm’s instructions as an incorrect statement of the law. (See R. 207:388-98; see also R. 207:391 (recognizing that Verne can “either make an arrest or he can’t”); 207:395, 396 (stating the jury should decide whether Verne could use force to make Malcolm leave the store)). The requested instructions were proper.

B. MALCOLM’S REQUESTED INSTRUCTIONS ARE SUPPORTED BY THE EVIDENCE.

“It is defendant’s right to have the jury instructed on his theory of the case so long as the requested instruction is warranted by the evidence presented at trial.” State v. Valdez, 604 P.2d 472, 473 (Utah 1979). In assessing whether the trial court should have given Malcolm’s requested instructions, this Court will view the facts and the reasonable inferences “in the light most favorable to the defense.” Spillers, 2007 UT 13, ¶ 10 (citation omitted). It will not concern itself with the reasonableness or credibility of the evidence since those issues are for the jury. See Torres, 619 P.2d at 695. This Court will decide only “whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, a decision which must be made concerning all jury instructions in any trial.” State v. Baker, 671 P.2d 152, 159 (Utah 1983); see State v. Law, 147 P.2d 324, 327 (Utah 1944) (whether defendant had a reasonable basis to believe his adversary would take his life or do him great bodily harm was a jury question); State v. Turner, 79 P.2d 46, 52, 54 (Utah 1938) (whether defendant’s adversary provoked him was a jury question).

In this case, the evidence supported Malcolm’s requested instructions. Specifically, witnesses testified that before the shooting, they observed that Malcolm was agitated and flustered in the convenience-store area of the Sapp Brothers Truck Stop. (See R. 206:118, 138; see also 206:79, 95, 101 (stating Malcolm was disruptive, loud and a little obnoxious); 206:139 (stating Malcolm was talking loudly and aggressively); 206:146 (stating Malcolm asked, “Why can’t I get any service around here?”); 206:155

(stating Malcolm was loud and belligerent); 206:171). Verne Jenkins, the security guard, responded by expressing that Malcolm needed to leave. (R. 206:79, 103; see also 206: 97-98 (stating Malcolm may have said. “All this is just for a piece of gum. All I want is gum.” And Verne said, “No, you are being rude. You need to leave.”); 206:141-42 (stating Verne asked Malcolm to calm down or leave and he used an authoritative tone)).

While Malcolm was in the process of collecting his bicycle from the Burger King area to leave (R. 207:457-58), Verne used force and initiated a physical altercation against him. (R. 206:79-80, 93, 147; 207:458-59, 483-84; see also 206:94 (Malcolm pulled away); 206:125, 127 (stating Verne tried to take Malcolm down; stating Verne took Malcolm in a headlock and the witness thought it was just “typical security guard action”); 206: 131-32 (stating Verne placed Malcolm in a headlock in an effort to detain him and to get him to leave); 206:142-43, 147 (stating Malcolm went over to his bike and Verne grabbed him by the shoulder and the men “got in a scuffle”); 206:157-58 (stating the struggle started when “Vern[e] was trying to get his hands on [Malcolm]” to get him out of the store; and describing Verne as having his arm in front of Malcolm’s chest)).

The evidence supports that Verne used physical force to detain Malcolm or to make a citizen’s arrest as Malcolm was trying to leave; also Verne used physical force to expel Malcolm from the premises. (See supra, pp. 17-18, herein; see also R. 208:547-48 (prosecutor recounted witness testimony that Verne tried to “detain” or “restrain” Malcolm; and Verne used physical force in an effort to get Malcolm “to leave the store” after Malcolm mumbled something); 208:564-65 (prosecutor claimed that the “only mistake Verne made” was in trying to restrain Malcolm)). Consequently, the jury should

have been instructed as to when a person may use force to make a citizen's arrest and/or to expel someone from property. (*See supra*, Argument A., herein; *see also* R. 139; 140 (requested instructions)). Those instructions would have allowed the jury to consider the evidence in context to resolve important questions of fact.

Specifically, the jury should have been allowed to decide whether Verne initiated the physical confrontation to make an arrest or to expel Malcolm from property; whether Verne used lawful or unlawful force in that regard; whether Verne was unjustified in his conduct; and/or whether he deliberately and unlawfully provoked Malcolm. (*See, e.g.*, R. 207:457-59 (stating Malcolm was collecting his bike to leave when Verne initiated a physical attack); *see also* 208:533-34 (defense counsel argued that Verne did not have justification to attack Malcolm or to escort him from the property with force); 208:535, 537-38, 542-43, 544 (defense counsel argued that Malcolm was asked to leave, he was leaving, and Verne used physical force; also physical force was unjustified where Malcolm did not threaten anyone or destroy property); *but see* R. 157; 155 (advising the jury that closing argument from the attorneys is not evidence; and admonishing the jury that it must rely on the instructions for the law)).

Those questions were relevant in considering whether Verne's provocation would cause a reasonable person to suffer overwhelming distress or to believe that he was entitled to defend himself, although he may not be entitled to use deadly force. *See, e.g., Spillers*, 2007 UT 13, ¶¶ 12, 16-23 (recognizing that when the evidence is ambiguous and susceptible to different interpretations, the jury should be instructed on the applicable law; also evidence supporting that the deceased initiated a physical attack against the

defendant would support extreme emotional distress and imperfect legal justification); State v. Johnson, 185 P.2d 738, 744 (Utah 1947) (citing cases from other jurisdictions to support that when the evidence raises questions going to justification or provocation, the jury should be instructed on the matter); Turner, 79 P.2d at 52, 54 (stating the issue of provocation is for the jury).

Indeed, there was a factual interconnection between Malcolm's requested instructions on a person's use of force, and his defense for imperfect-legal-justification manslaughter and extreme-emotional-distress manslaughter. (See R. 173-80 (jury instructions for manslaughter alternatives)). Specifically, the defense of imperfect legal justification applies "when the defendant caused another's death 'under a *reasonable belief that the circumstances provided a legal justification* or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.'" Spillers, 2007 UT 13, ¶ 22 (emphasis added; citation omitted). If the evidence supports that the defendant "*was entitled to defend himself* . . . but [was] not entitled to use deadly force" when the victim initiated a physical encounter, those facts "create a question of fact" for the jury. Id. at ¶ 23 (emphasis added; ellipsis in original; citation omitted).

Likewise, the defense of extreme emotional distress applies if evidence supports that the defendant caused the person's death under distress "for which there is a reasonable explanation or excuse.'" Id. at ¶ 13 (citation omitted). The "reasonableness of [the] explanation or excuse" requires the jury to consider whether the circumstances are such that the reasonable person would suffer distress. See id. In that regard,

A person suffers extreme emotional distress when exposed to “‘extremely unusual and overwhelming stress’ such that the average reasonable person” would react by experiencing a loss of self-control. In such a situation, a person’s reason would be overwhelmed by intense feelings, such as passion, anger, distress, grief, or excessive agitation.

Id. at ¶ 14 (citations omitted).

The extreme-emotional-distress defense applied in Spillers, where the evidence supported that the victim initiated a physical encounter by striking the defendant on the back of the head. Id. at ¶ 16. As a result of the blow, the defendant felt “cloudy, dazed, uncomfortable, and scared.” Id. He responded by firing a weapon at the victim “three times, although at trial” his recollection was faulty: “he testified that he remembered firing only a single shot.” Id. The State argued that defendant Spillers’ description of the encounter and his deliberate conduct in shooting the victim supported that he “acted ‘rationally’ throughout the encounter.” Id. at ¶ 18. The supreme court considered that interpretation, but ruled that the State’s theory would not end the analysis. See id.

According to the court, if the evidence is susceptible to different interpretations and the jury could infer that a reasonable person would suffer distress under the circumstances, it must be properly instructed on the matter. See id. at ¶¶ 19-20. The question of the parties’ conduct is for the jury to decide. See id. at ¶ 18. The jury may “adopt the State’s version of events” for murder and “also believe” that defendant “was not acting rationally, but rather was under extreme emotional distress as a result of [the victim’s] attack” for a manslaughter conviction. Id.; see also Johnson, 185 P.2d at 743 (stating “a rapidly developing situation might so confuse, enrage, or mentally disturb a reasonable person that he would *fail to appreciate* that serious consequences might result

from his acts”) (emphasis added).

Since those alternative forms of manslaughter were before the jury in Malcolm’s case (R. 173-180), Malcolm’s requested instructions – concerning a person’s use of force to make an arrest or to expel someone from property – would have assisted the jury in sorting through the issues to find that Verne initiated an unlawful altercation to provoke Malcolm for application of the manslaughter alternatives. Indeed, when defense counsel requested the instructions at trial, he pointed out that based on the evidence, the jury may believe “that [Verne] was arresting Mr Malcolm” and it may believe that “it was legal for [Verne] to be the aggressor in this altercation” and to use force against Malcolm in his capacity as a security guard. (R. 207:390-91, 392, 393). Thus, it would be “necessary to clarify for the jury” when force may be justified or unjustified for an arrest or in defense of property. (R. 207:391, 395 (stating that since there was no evidence that Malcolm committed a crime as he was leaving the store, Verne was not justified in using physical force)); see also Jorgensen, 739 P.2d at 82 (recognizing that failure to give instructions constitutes error if it tends to mislead the jury).

The prosecutor seemed to agree that evidence was in dispute on that point. (See R. 207:394). Moreover, the judge agreed that the facts created an issue “for the jury to decide.” (R. 207:395). “[T]he jury is going to have to determine, based on the evidence or lack of evidence, the facts in this case and what happened or didn’t happen. And maybe they’ll have enough evidence; maybe they won’t. That’s the State’s burden.” (R. 207:395-96). The judge acknowledged that a security guard can say, “leave the premises” (R. 207:396), and he acknowledged that the issue of physical force is “what the jury is here

to find out”; also, “all of that is up to the jury to decide.” (R. 207:396, 397). Notwithstanding, the trial court refused to give Malcolm’s requested instructions. (R. 207: 397). That was tantamount to preventing the jury from deciding if Verne’s conduct was unlawful and constituted unjustified provocation for application of the manslaughter defenses.

In addition, the court ruled that the instructions as a whole were sufficient where they admonished the jury that Verne Jenkins was “an ordinary, everyday person” and “can be treated just like anybody else.” (R. 207:397; see, e.g., R. 195); (but see infra Argument C, herein).

Yet that was not enough. An “ordinary, everyday person” may or may not be justified in using force for an arrest or to expel another from property. See, e.g. Utah Code Ann. §§ 76-2-403; 76-2-406; (supra, Argument A., herein). The jury should have been instructed on those matters. Stated another way, if Verne – an ordinary, everyday person – used unlawful force or was not justified in arresting Malcolm or expelling him from property, those facts would support unlawful provocation, and such provocation may cause a reasonable person in Malcolm’s position to suffer overwhelming distress and/or to believe he could defend himself, although he may not be entitled to use deadly force. See, e.g., Utah Code Ann. § 76-5-203(4) (defining the manslaughter defenses). Those concepts were not properly conveyed to the jury. (See infra, Argument C.)

Malcolm’s requested instructions would have given the jury context and guidance. (See, e.g., R. 155 (instructing the jury that it must decide the facts from the evidence and it must “take the law I give you in the instructions” and “apply it to the facts”)); see also Spillers, 2007 UT 13, ¶¶ 16, 23 (recognizing that the evidence would support that the

deceased was the aggressor in the attack and under those circumstances it would support instructions for extreme emotional distress and imperfect legal justification); State v. Ross, 501 P.2d 632, 635 (Utah 1972) (recognizing that “provocation” is an issue for the jury in determining manslaughter). They were pertinent to his defense. See Spillers, 2007 UT 13, ¶ 19 (stating as long as evidence supports defendant’s theory, he “is entitled to the jury instruction if he requests it”). The trial court erred in failing to give the instructions to the jury. Ontiveros, 835 P.2d at 205 (stating the trial court has a duty to instruct the jury on the law applicable to the facts).

C. THE JURY CHARGE AS A WHOLE DID NOT ADDRESS THE RELEVANT CONCEPTS CONTAINED IN MALCOLM’S REQUESTED INSTRUCTIONS.

Under the law, the defenses of imperfect-legal-justification manslaughter and extreme-emotional-distress manslaughter will serve to reduce murder to manslaughter. See Utah Code Ann. § 76-5-203(4). The defenses may apply if the evidence supports, for example, that the victim initiated an attack against the defendant, and the defendant reacted by killing the victim. See, e.g., Spillers, 2007 UT 13, ¶¶ 16, 23; State v. Shumway, 2002 UT 124, ¶¶ 11-13, 14, 63 P.3d 94; see also State v. Padilla, 776 P.2d 1329, 1330 (Utah 1989) (recognizing that extreme-emotional-distress manslaughter incorporates the heat-of-passion standard); State v. Hansen, 734 P.2d 421, 428 (Utah 1986) (recognizing that if the evidence supports alternative theories, the jury must be instructed on the appropriate alternatives); State v. Howell, 649 P.2d 91, 93 (Utah 1982) (identifying evidence for manslaughter where an individual and the defendant engaged in an altercation prompting the defendant to retrieve his gun, and when he returned, two other individuals

initiated successive physical encounters against the defendant and he responded by killing one and wounding the other; also recognizing that manslaughter alternatives are consistent with intentional conduct); Ross, 501 P.2d at 635 (stating provocation is an element for the jury).

Malcolm's requested instructions for use of force to make an arrest or to expel another from property would have advised the jury on important points of law. (R. 139; 140; see also supra, Argument B., herein). The instructions would have allowed the jury to find that Verne was not justified in using force, and his unlawful use of force would cause a reasonable person to suffer overwhelming distress and to believe he could defend himself for application of the manslaughter alternatives. See, Spillers, 2007 UT 13, ¶¶ 16, 23; Shumway, 2002 UT 124, ¶¶ 11-13, 14.

Indeed, the trial court's instructions failed to admonish the jury on those important concepts. (See R. 155-99) (attached hereto as Addendum F). The instructions failed to explain the circumstances in the context of this case and in a way that would allow the jury to consider whether Verne's use of force was justified or not. (See R. 155-99).

Specifically, the trial court's instructions advised the jury on the basic elements for murder, manslaughter, and negligent homicide. (See R. 171-184). They advised the jury on perfect self defense. (R. 190-94). The instructions advised the jury that an actor is justified in threatening or using force against another person to the extent the actor "reasonably believes that force is necessary to defend himself" or other third parties against the other person's "imminent use of unlawful force." (R. 185 (also stating deadly force is justified if the actor reasonably believes it is necessary to prevent death or serious

injury as a result of another person's imminent unlawful force, or to prevent a forcible felony)). The instructions defined "unlawful[]" to mean without legal justification. (R. 168, 182). And they defined "imminen[t]" or reasonableness with reference to factors, where the jury could consider the "nature" and "immediacy" of the danger, the probability that the force would result in death or serious injury, the other person's "prior violent acts" or "propensities," and "any patterns of abuse or violence" in the relationship between the actor and the other person. (R. 187).

The trial court's use-of-force instructions were insufficient for two reasons. First, to the extent the jury applied the trial court's use-of-force instructions to assess whether Malcolm – as the actor – was justified in using force to defend against Verne's conduct, the instructions left a gap. That is, the instructions failed to give the jury any guidance as to when Verne's use of force may be lawful or unlawful – *i.e.*, to make an arrest or to expel Malcolm from the property – to support that *Malcolm* in fact was *justified* to use force, although he was not justified to use deadly force. (See R. 155-99 (instructions as a whole)). Thus, while the evidence created an issue of fact for the jury (*see supra*, Argument B., herein), the jury was not able to resolve the issue since it was not instructed as to when Verne's conduct may be considered unlawful in the context of this case. (R. 155-99).

Second, to the extent the jury applied the trial court's use-of-force instructions to assess whether Verne – as the actor – was justified in threatening or using force to defend himself or others against Malcolm's conduct, the instructions again left a gap. That is, the jury should have been instructed as to whether Verne could use force to make an

arrest or to expel Malcolm from property. (See R. 139; 140). Those instructions would have given guidance to the jury in assessing whether Verne’s use of force was proper. If Verne was not justified to use force under any of the alternatives set forth in the instructions (*i.e.*, to defend against “imminent” and “unlawful” force (R. 185), to make an arrest (R. 139), or to expel another from property (R. 140)), the jury could find that Verne provoked Malcolm. See, e.g., Hansen, 734 P.2d at 428 (recognizing that when the evidence supports alternative theories, the trial court must instruct the jury).

Next, the trial court’s instructions stated that a person is “not justified in using force” if he “initially provoke[d] the use of force against himself with the intent to use force as an excuse to inflict” harm; if he attempted to commit, committed, or was fleeing from the commission of a crime; or if he were the aggressor. (R. 186). Again, that instruction was insufficient for two reasons. First, if the jury relied on it to assess whether Malcolm was “not justified” in using force, the instruction left a gap: it failed to advise whether Verne’s conduct in using force to arrest or expel Malcolm from the property was justified or not. (See R. 139; 140). If the jury had been properly instructed, it could find that Verne’s conduct in using force was not justified. Also, it could find that Malcolm reasonably believed he could use force – since under the law he did not initially provoke the physical encounter; he was not committing or attempting to commit, or fleeing from a crime; and he was not the aggressor. (See, e.g., supra, Argument B., herein).

Second, if the jury relied on the trial court’s instruction to assess whether Verne was “not justified” in using force (R. 186), the instructions were deficient. The jury should have been advised as to when the use of force for an arrest or to expel someone

from property may be justified. (*See, e.g.*, R. 139; 140). It then could assess whether Verne's conduct was justified or not under the law.

Finally, the trial court's instructions advised the jury that for extreme emotional distress, the distress must be triggered by something external. (R. 175). Also, the instructions advised that imperfect legal justification may apply if the evidence "tends to show that the defendant acted under circumstances where he believed he was entitled to defend himself although under the law he was not entitled to use deadly force." (R. 178). While the evidence supported the defenses (*see supra*, Argument B.), the jury was not allowed to assess the defenses in the context of whether Verne was justified to use force for an arrest or to remove Malcolm from property; or whether his use of force was unjustified, thereby triggering distress and a reasonable belief that Malcolm was entitled to defend himself. The instructions viewed as a whole failed to cover the concepts.

In short, the trial court's instructions advised the jury on the basic elements for murder, manslaughter, and negligent homicide; and on perfect self defense. (*See* R. 168, 171-184; 190-94). They explained that an actor could use force if he believed it was necessary to defend against unlawful force (185); they explained that "unlawful[]" force was illegal force. (R. 168, 182). They explained that the jury could consider the need to use force based on several factors including the nature and immediacy of the danger, the level of the unlawful force, prior acts or propensities, and the history of the parties. (R. 187). The instructions explained circumstances under which a person may not be "justified in using force." (R. 186). And they explained that extreme emotional distress must be triggered by something external, and an imperfect legal justification required a

reasonable belief that the defendant was entitled to defend himself. (R. 175; 178). Notwithstanding these salient concepts, the instructions failed to explain when force may be legal for a citizen's arrest or to remove a person from property. (See R. 155-99). In that regard, the jury was not allowed to consider whether Verne's actions in initiating the physical encounter to make an arrest and to expel Malcolm from the store was lawful or whether his actions were unjustified for application of the manslaughter alternatives. (Id.)

D. THE TRIAL COURT'S REFUSAL TO GIVE MALCOLM'S REQUESTED INSTRUCTIONS CONSTITUTES PREJUDICIAL ERROR.

In this case, as stated supra, the evidence supported the alternative theories for the defense of extreme-emotional-distress manslaughter and imperfect-legal-justification manslaughter. (See, e.g., supra, Argument B., herein). The evidence also supported instructions on when a person can make a citizen's arrest with use of force, and when a person may be justified in using force to expel another from property. (Id.) Malcolm's instructions on a person's use of force would have allowed the jury to consider the facts in the context of the law to find that the victim, Verne Jenkins, initiated a physical confrontation with Malcolm that was excessive and unlawful, thereby supporting that Verne unjustifiably provoked Malcolm into a physical confrontation prior to the shooting. In addition, the instructions would have allowed the jury to find that Verne's conduct would cause a reasonable person to suffer overwhelming distress, and to believe that he was entitled to act in self defense, although he may not be entitled to use deadly force. Evidence was presented to support the instructions (id.), and as acknowledged by the trial court, the evidence created questions of fact for the jury. (See R. 207:395-97). That is

enough to support prejudice.

As recognized in *State v. Knight*, “when an element of the crime . . . is in dispute, and the evidence is consistent with both the defendant's and the State's theory of the case, failing to instruct on the lesser included offense presumptively affects the outcome of the trial . . . [and] our confidence in the verdict is undermined.” 2003 UT App 354, ¶ 17, 79 P.3d 969. Clearly, the case at hand meets these criteria.

Spillers, 2007 UT 13, ¶ 24.

Indeed, Malcolm was not obligated in this case to present the evidence for the requested instructions or to prove their relevance to the jury for the manslaughter alternatives. *See Spillers*, 2007 UT 13, ¶ 19. “A defendant is not required to testify at all, nor is he required to present any evidence at trial; he ‘may simply point to ambiguities or inconsistencies in the evidence presented by the State and require the State to prove every element of the offense beyond a reasonable doubt.’” *Id.* “[A] defendant in a criminal case bears no burden of persuasion.” *Id.* “‘The ultimate burden of proving the defendant's guilt beyond a reasonable doubt remains on the state, whether defendant offers any evidence in an effort to prove affirmative defenses or not.’” *Id.* (citation omitted). It is enough that the State’s evidence has created the jury questions at issue, and it is enough that the evidence “‘or lack thereof [has] create[d] a reasonable doubt as to any element of the crime.’” *Id.* (citation omitted).

In this case, the jury found Malcolm guilty of intentional homicide. (*See* R. 202). That offense is consistent with the following evidence: Verne used force to make a citizen’s arrest (*see, e.g., supra*, pp. 17-18, herein); the force for an arrest was not justified (*see* R. 139); Verne used force to expel Malcolm from the premises (*see, e.g., supra*, pp. 17-18, herein); the force was not justified under the circumstances since Malcolm was

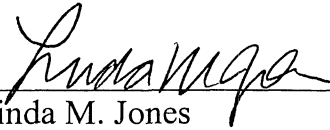
already in the process of leaving the store on his own (see id.; see also R. 140); Verne's unlawful use of force provoked Malcolm and Malcolm suffered overwhelming distress as a result of Verne's attack; also the distress was such that he did not fully appreciate the consequences of his actions. (See supra, Argument B., herein). Moreover, Malcolm was justified in defending himself although he was not justified in using deadly force. (See id.) The evidence and the conviction are consistent with Malcolm's requested instructions. "As long as the evidence presented at trial supports a defendant's theory of the crime and provides a rational basis for a verdict on the lesser included offense, a defendant is entitled to the jury instruction if he requests it." Spillers, 2007 UT 13, ¶ 19.

While the evidence may be consistent with other defenses and/or lesser offenses, that does not undermine the importance of Malcolm's requested instructions here. As the Utah Supreme Court has recognized, "Society has a legitimate interest in the jury's freedom to act according to the evidence." Hansen, 734 P.2d at 424 (citation omitted). "A primary purpose of a criminal trial is the vindication of the laws of a civilized society against those who are guilty of transgressing those laws. The process, however, must be based on procedures which are consonant with fairness both to the defendant and the State." Howell, 649 P.2d at 94. "It is the duty of the judge to instruct the jury on [the] relevant law." Hansen, 734 P.2d at 428. If the trial court fails in that duty, the jury will never be "given the choice," Hansen, 734 P.2d at 428, of considering the appropriate outcome for the case. While the jury here was instructed to consider the alternative forms of manslaughter, it was not allowed to consider the facts in the context of whether Verne's conduct was unlawful and provoked Malcolm. That was error.

CONCLUSION

For the reasons set forth herein, Malcolm respectfully requests that this Court reverse the conviction and remand the case for a new trial.

SUBMITTED this 9 day of February, 2009.



Linda M. Jones

Rudy J. Bautista

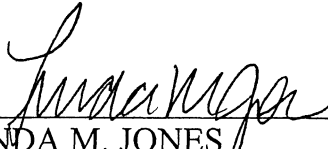
Stephen Howard

Salt Lake Legal Defender Assoc.

Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 9 day of February, 2009.



LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this ___ day of February, 2009.

Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 071909592 FS
	:	
ROGER ALLEN MALCOLM,	:	Judge: PAUL G. MAUGHAN
Defendant.	:	Date: August 25, 2008

PRESENT

Clerk: cheril

Prosecutor: COOK, ALICIA H

Defendant

Defendant's Attorney(s): BAUTISTA, RUDY J

DEFENDANT INFORMATION

Date of birth: August 24, 1956

Video

Tape Number: DVR Tape Count: 10:02

CHARGES

1. CRIMINAL HOMICIDE - 1st Degree Felony
- Disposition: 06/26/2008 Guilty

HEARING

TAPE: DVR COUNT: 10:02

Parties present and ready to proceed with sentencing.
Defense counsel motions the court to reduce the level of conviction to a 2nd Degree Felony.
Victims family addresses the court
State objects to a reduction in the level of conviction
Defense motion is denied.
Sentence is imposed.

Case No: 071909592
Date: Aug 25, 2008

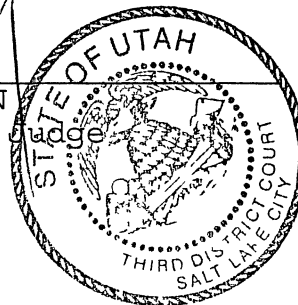
SENTENCE PRISON

Based on the defendant's conviction of CRIMINAL HOMICIDE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Dated this 26 day of Aug, 2008.


PAUL G. MAUGHAN
District Court Judge



Tab B

UTAH CODE ANN. § 76-5-201 (2003)

76-5-201 Criminal homicide --Elements --Designations of offenses.

(1) (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense. causes the death of another human being, including an unborn child at any stage of its development.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

(2) Criminal homicide is aggravated murder, murder, manslaughter, child abuse homicide, homicide by assault, negligent homicide, or automobile homicide.

History: C. 1953, **76-5-201**, enacted by L. 1973, ch. 196, § **76-5-201**; 1983, ch. 90, § 3; 1983, ch. 95, § 1; 1991, ch. 10, § 7; 1991 (1st S.S.), ch. 2, § 1; 1995, ch. 291, § 6; 2002, ch. 327, § 1.

UTAH CODE ANN. § 76-5-203 (Supp. 2007)

§ 76-5-203. Murder

(1) As used in this section, "predicate offense" means:

- (a) a violation of Section 58-37d-4 or 58-37d-5, Clandestine Drug Lab Act;
- (b) child abuse, under Subsection 76-5-109(2)(a), when the victim is younger than 18 years of age;
- (c) kidnapping under Section 76-5-301;
- (d) child kidnapping under Section 76-5-301.1;
- (e) aggravated kidnapping under Section 76-5-302;
- (f) rape of a child under Section 76-5-402.1;
- (g) object rape of a child under Section 76-5-402.3;
- (h) sodomy upon a child under Section 76-5-403.1;
- (i) forcible sexual abuse under Section 76-5-404;
- (j) sexual abuse of a child or aggravated sexual abuse of a child under Section 76-5-404.1;
- (k) rape under Section 76-5-402;
- (l) object rape under Section 76-5-402.2;
- (m) forcible sodomy under Section 76-5-403;
- (n) aggravated sexual assault under Section 76-5-405;
- (o) arson under Section 76-6-102;
- (p) aggravated arson under Section 76-6-103;
- (q) burglary under Section 76-6-202;

(r) aggravated burglary under Section 76-6-203;

(s) robbery under Section 76-6-301;

(t) aggravated robbery under Section 76-6-302;

(u) escape or aggravated escape under Section 76-8-309; or

(v) a felony violation of Subsection 76-10-508(2) regarding discharge of a firearm or dangerous weapon.

(2) Criminal homicide constitutes murder if:

(a) the actor intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another, the actor commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life, the actor knowingly engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d)(i) the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense, or is a party to the predicate offense:

(ii) a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense; and

(iii) the actor acted with the intent required as an element of the predicate offense;

(e) the actor recklessly causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer under Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest under Section 76-8-305 if the actor uses force against a peace officer;

(f) commits a homicide which would be aggravated murder, but the offense is reduced pursuant to Subsection 76-5-202(4); or

(g) the actor commits aggravated murder, but special mitigation is established under Section 76-5-205.5.

(3)(a) Murder is a first degree felony.

(b) A person who is convicted of murder shall be sentenced to imprisonment for an indeterminate term of not less than 15 years and which may be for life.

(4)(a) It is an affirmative defense to a charge of murder or attempted murder that the defendant caused the death of another or attempted to cause the death of another:

(i) under the influence of extreme emotional distress for which there is a reasonable explanation or excuse; or

(ii) under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

(b) Under Subsection (4)(a)(i) emotional distress does not include:

(i) a condition resulting from mental illness as defined in Section 76-2-305; or

(ii) distress that is substantially caused by the defendant's own conduct.

(c) The reasonableness of an explanation or excuse under Subsection (4)(a)(i) or the reasonable belief of the actor under Subsection (4)(a)(ii) shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(d) This affirmative defense reduces charges only as follows:

(i) murder to manslaughter; and

(ii) attempted murder to attempted manslaughter.

Laws 1973, c. 196, § **76-5-203**; Laws 1975, c. 53, § 2; Laws 1977, c. 83, § 2; Laws 1979, c. 74, § 1; Laws 1986, c. 157, § 1; Laws 1990, c. 227, § 1; Laws 1991, c. 10, § 9; Laws 1996, c. 123, § 1, eff. April 29, 1996; Laws 1999, c. 2, § 2, eff. May 3, 1999; Laws 1999, c. 90, § 2, eff. May 3, 1999; Laws 2000, c. 101, § 1, eff. May 1, 2000; Laws 2000, c. 125, § 3, eff. May 1, 2000; Laws 2003, c. 146, § 1, eff. May 5, 2003; Laws 2006, c. 348, § 2, eff. May 1, 2006; Laws 2007, c. 340, § 2, eff. April 30, 2007.

UTAH CODE ANN. § 76-2-403 (2008)

§ 76-2-403. Force in arrest

Any person is justified in using any force, except deadly force, which he reasonably believes to be necessary to effect an arrest or to defend himself or another from bodily harm while making an arrest.

CREDIT(S)

Laws 1973, c. 196, § 76-2-403.

UTAH CODE ANN. § 76-2-406 (2008)

§ 76-2-406. Force in defense of property

A person is justified in using force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

- (1) Lawfully in his possession; or
- (2) Lawfully in the possession of a member of his immediate family; or
- (3) Belonging to a person whose property he has a legal duty to protect.

CREDIT(S)

Laws 1973, c. 196, § 76-2-406.

Tab C

1 (Whereupon, the proceedings stood in noon recess;
2 after which, at the approximate hour of 1:30 p.m.,
3 the following proceedings continued in the presence
4 and hearing of the defendant but without the presence
5 and hearing of the jury:)

6
7 THE COURT: We're back on the record in State versus
8 Malcolm. Counsel, have you had a chance to -- all parties --
9 well, the attorneys are present. The jury is not here. Have
10 you had a chance to go through the jury instructions?

11 MR. BAUTISTA: We have, your Honor. Your Honor --
12 and they seem to be appropriate for what we asked originally,
13 and then cover aspects that we asked; except there were three
14 additional instructions that the court said that it was not
15 inclined to admit, and I would like to have the court
16 reconsider that, or have the benefit of the record for that --

17 THE COURT: Sure --

18 MR. BAUTISTA: -- because I do not believe --

19 THE COURT: -- you're welcome to it.

20 MR. BAUTISTA: Thank you, your Honor. Your Honor, in
21 this case, the instruction I had offered -- and I will read it
22 for the record, please --

23 A security guard, who is not a certified peace
24 officer, has only the same rights and privileges
25 afforded to any ordinary person.

1 I believe that's a true and correct statement of the law. It's
2 true regardless that he's nothing more than a civilian.

3 Peace officers, certified peace officers, hold a
4 different standard than normal citizens, especially when
5 they're considered in positions of authority.

6 I'm afraid that the jury may consider the security
7 guard in this case a person of high authority, and they may
8 view him in a position where he is trained as a law enforcement
9 officer and can tell when, where and how and if necessary what
10 force is used to detain someone, or to use physical force to
11 arrest someone.

12 There was evidence that people are saying that it
13 appeared that Mr. Jenkins was trying to detain Mr. Malcolm, and
14 I believe what that purpose -- and I think the jury needs to
15 understand, and it should be an instruction -- that he is in no
16 position of special trust. He's an ordinary citizen like
17 anyone else.

18 In regards to the next instruction,
19 Any person is justified in using reasonable force,
20 except deadly force, which he reasonably believes is
21 necessary to effect an arrest.

22
23 However, the person does so at his own peril and the
24 arrest must be legal. If the arrest is determined to
25 be invalid or without legal justification, the person

1 making the arrest loses this justification and may be
2 subject to criminal prosecution for, amongst other
3 charges, unlawful detention and assault.

4
5 Depending on the circumstances, the person making the
6 illegal arrest could be charged with aggravated
7 assault.

8
9 I think that's a true and correct statement of the law. The
10 law allows a citizen to perform a citizen's arrest and use
11 reasonable force to effect that. It may not be deadly force
12 but they may use reasonable force.

13 I'm afraid that the jury is going to believe that
14 Mr. Jenkins was arresting Mr. Malcolm. Inasmuch, they're going
15 to believe, if that's the case, then it was legal for him to be
16 the aggressor in this altercation.

17 And our argument, and I think there's evidence to
18 support it, is that the first physical contact between these
19 individuals was Mr. Jenkins touching Mr. Malcolm, not the other
20 way around.

21 And I'm afraid that the jury, if they believe that he
22 had authority to arrest someone as a security guard, or if
23 they're aware that citizens may make arrests, they may believe
24 that it's okay for you to use reasonable force to arrest
25 someone.

1 Thereby, if he was using reasonable force, initially,
2 their argument would be, and if he was effecting an arrest,
3 Mr. Malcolm had no right to defend himself.

4 And I believe that this is necessary to clarify for
5 the jury so that they can understand that. And, more
6 importantly, there's been no evidence of any crime that Mr.
7 Malcolm committed to give rise to any possible legal detention
8 or arrest by Mr. Jenkins.

9 The video, the evidence has been contradictory by
10 some of the witnesses, but the evidence was Mr. Malcolm was
11 asked to leave the store, or ordered to leave it.

12 THE COURT: Isn't it -- doesn't your argument
13 preclude the admission of these? I mean, when you say there's
14 no evidence of arrest, that's what your argument is: That
15 there was an arrest made, and now you're saying there was no
16 arrest.

17 MR. BAUTISTA: Well, your Honor, there were jurors
18 who said that they believed -- or, there were witnesses who
19 said they believed that Mr. --

20 THE COURT: You heard one witness that testified that
21 that may have happened.

22 MR. BAUTISTA: And again, we need the jury to
23 understand there was no legal authority to make that arrest.
24 There was no --

25 THE COURT: He can either make an arrest or he can't.

1 MR. BAUTISTA: In this situation, him physically
2 grabbing Mr. Malcolm, when Mr. Malcolm committed no crime, was
3 an assault.

4 THE COURT: That may be true, but it doesn't mean
5 it's an arrest.

6 MR. BAUTISTA: Well, without a jury instruction --
7 well, again, because he's a security guard, they may believe he
8 has some authority that they're not instructed on under the
9 law.

10 THE COURT: There's already evidence in the record
11 that he was a security guard and that he was not a peace
12 officer.

13 MR. BAUTISTA: We don't know if they know the
14 difference. We don't know -- there are such things as
15 certified security guards. For example, we had a prospective
16 juror who was a security guard at the airport. She's a federal
17 employee. They go through training and she is a
18 higher-standard security guard, almost akin to a peace officer;
19 but yet she said she's --

20 THE COURT: Again, there's no evidence here, that
21 I've heard so far, that -- whether he is or isn't. He may be
22 POST certified, but he certainly wasn't acting that way.

23 MR. BAUTISTA: Well, your Honor --

24 THE COURT: So you want me to assume something I
25 can't. There's no evidence for it. It assumes facts not in

1 evidence.

2 MR. BAUTISTA: Well, your Honor, when it's closing
3 arguments, I argue to the jury that Mr. Jenkins had no legal
4 right to place his hand on Mr. Malcolm, I believe that's a
5 correct statement of the law. But without a jury instruction,
6 they are thereby instructed that anything I say is not evidence
7 and not the law.

8 And that's a correct statement of the law. And I
9 believe that, for him to have used force against Mr. Malcolm,
10 he had to have justification.

11 If he didn't have a justification, then he was
12 assaulting Mr. Malcolm.

13 THE COURT: You're free to make that argument.

14 MR. BAUTISTA: But again, that argument is muted
15 without having an instruction to support it.

16 THE COURT: Let's hear from the State.

17 MS. COOK: Thank you. I think that this leads us in
18 to an extremely confusing area that is in fact not at all
19 qualified by law as Mr. Bautista is representing, and leads us
20 to all these questions that we are going to try to have the
21 jury evaluate when it is completely unnecessary.

22 The question in this case is whether these two
23 people, who were in a physical confrontation, if it was
24 reasonable for Mr. Malcolm to use deadly force because of this
25 physical confrontation.

1 And you can lift Verne Jenkins right out of the
2 uniform, and just look at them as two men who are scuffling.
3 That's the real heart of this case, that physical scuffle, the
4 circumstances of that physical contact; did it give rise to the
5 use of deadly force?

6 And I don't think we should give instructions to the
7 jury that are going to be confusing, that are going to cause
8 them to try to evaluate the circumstances that there is not
9 clear evidence about. We don't know that Verne Jenkins was
10 trying to arrest. When the witnesses described him as trying
11 to detain the defendant? We don't know they're using that in
12 the technical term of "detained."

13 It could just be that they're just trying to stop
14 this person from moving, in that sense of the word "detained,"
15 not in the police-officer sense of the word "detain."

16 It is a very vague and very confusing area. And to
17 say that a security guard has no right to lay a hand on
18 someone, when that security guard's whole job is to escort
19 unruly customers off the premises?

20 To say that there wasn't any other crime there,
21 that's going to lead me into all kinds of arguments like "was
22 Mr. Malcolm engaging in disorderly conduct? Was he in fact
23 engaged in criminal trespass?" It just opens up a whole bunch
24 of issues that are not really relevant to the heart of this
25 case and will confuse the jury and distract us from what the

1 real question is here.

2 THE COURT: Any response?

3 MR. BAUTISTA: Please, your Honor; thank you. Your
4 Honor, there is no crime committed in this situation which
5 allowed Mr. Jenkins to use physical force on Mr. Malcolm.

6 If he wanted him to leave the store, a person may use
7 reasonable force to get someone to terminate their criminal
8 interference with private property. That is correct.

9 However, you can't self-help and use force
10 immediately. If that person refuses to leave, then you can use
11 force. If that person is destroying your property, or
12 attempting to, you can use force; or if that person is a safety
13 risk to others or yourself --

14 THE COURT: But, isn't that up for the jury to
15 decide?

16 MR. BAUTISTA: But they don't know that, because
17 we're not instructing them in the law.

18 THE COURT: How can they know what happened? Nobody
19 can say -- I mean, this -- Mr. Jenkins may have well said,
20 "Mr. Malcolm, you're now trespassing; leave." He may not have
21 said it. Because nobody knows. Nobody heard it. And so you
22 can argue what you want.

23 But the fact is the jury is going to have to
24 determine, based on the evidence or lack of evidence, the facts
25 in this case and what happened or didn't happen.

1 And maybe they'll have enough evidence; maybe they
2 won't. That's the State's burden.

3 But the fact of the matter is, as far as the jury
4 instructions go, the jury instructions say any person -- and
5 that's exactly how Mr. Jenkins is to be viewed; is any person.
6 And the jury instructions cover those. The only exception is
7 to a peace officer, and there's been no evidence there's been a
8 peace officer involved in this.

9 So, you exclude a peace office and you're left with
10 anybody else; whether they're a security guard, a store
11 manager, or cashier.

12 A cashier can say, "leave the premises." A security
13 guard can say, "leave the premises." A manager can say, "leave
14 the premises." They're all treated the same.

15 MR. BAUTISTA: They may -- they have the right to
16 refuse service, and they have the right to tell someone to
17 leave the property. But if that person is complying with that
18 order, they may not then use force to evict that person.

19 THE COURT: That's where we come back to what the
20 jury is here to find out.

21 MR. BAUTISTA: I understand that, your Honor, but
22 that's the law, and that's why I'm asking the court to instruct
23 the jury. There is no law that says you may use force against
24 someone just because, if you order them to leave, and they
25 actually are leaving --

1 THE COURT: Well, all of that is up to the jury to
2 decide.

3 MR. BAUTISTA: I understand that, but without the
4 law, without the court instructing them on the law, when I tell
5 them what the law is, they're instructed not to believe me.
6 And that is the law.

7 THE COURT: Well, they -- okay. The instructions as
8 a whole, the court finds, cover this situation. They cover
9 Mr. Jenkins as an ordinary, everyday person, can be treated
10 just like anybody else. And what you want to get in raises the
11 specter of police officers, and that's not an element in this
12 case. So, I'm not going to give it.

13 MR. BAUTISTA: Thank you, your Honor. Your Honor, if
14 I may read the final instruction that we were discussing right
15 now. It had to do with reasonable force to evict someone from
16 a property.

17 A person is justified in using reasonable force,
18 other than deadly force, against another, when and to
19 the extent that he reasonably believes that force is
20 necessary to prevent or terminate criminal
21 interference with real property or personal property
22 lawfully in his possession or belonging to a person
23 whose property he has a legal duty to protect.

24
25 However, a person may only use force to remove the

1 person from real property if the person to be removed
2 refuses to leave, damages property, or threatens the
3 safety of others.

4

5 Your Honor, I would ask these be incorporated in the record; if
6 I may approach?

7 THE COURT: Sure.

8 MR. BAUTISTA: Your Honor, one other thing that just
9 arose. When I was discussing about the jury instructions right
10 now, the State indicated that they wanted the jury to lift Mr.
11 Jenkins from his uniform, look at him as an ordinary citizen,
12 and when this -- during this confrontation, Mr. Malcolm had the
13 right to use deadly force in his defense.

14 I think that's almost akin to an acknowledgment by the
15 State that this is not a first-degree murder and is, at most, a
16 manslaughter.

17 If that's the case -- I know they haven't rested
18 yet -- but I would make, at this time, and ask the court to
19 reserve decision for later, if it so decides, that this should
20 be amended from -- or, the count of murder in the first-degree
21 should be dismissed.

22 THE COURT: Based on what?

23 MR. BAUTISTA: The State's just indicated that the
24 question for the jury is to determine if Mr. Malcolm's use of
25 deadly force while he was defending himself was reasonable.

Tab D

INSTRUCTION NO. ____

Any person is justified in using reasonable force, except deadly force, which he reasonably believes to be necessary to effect an arrest. However, the person does so at his own peril inasmuch the arrest must be legal. If the arrest is determined to be invalid or is without legal justification, the person making the arrest loses this justification and may be subject to criminal prosecution for, amongst other charges, unlawful detention and assault. Depending on the circumstance, the person making the illegal arrest could be charged with aggravated assault.

Tab E

INSTRUCTION NO. ____

A person is justified in using reasonable force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

- 1) lawfully in his possession; or
- 2) belonging to a person whose property he has a legal duty to protect.

However, a person may only use force to remove a person from real property if the person to be removed refuses to leave, damages property, or threatens the safety of others.

Tab F

JUN 24 2008

SALT LAKE COUNTY

Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

ROGER ALLEN MALCOLM

Defendant.

**JURY INSTRUCTIONS:
OPENING**

Case No.071909592

Judge Paul Maughan

INSTRUCTION 1

Introduction

The defendant is accused of committing one or more crimes. At the appropriate time as the jury you are to decide whether the defendant is guilty or not guilty. I will give you these instructions now and others at the conclusion of the evidence. You are to consider and follow all instructions. Please keep an open mind throughout the trial.

INSTRUCTION 2

Information

The prosecution has filed a document—called an “Information”—that contains the charges against the defendant. The Information is not evidence. It is only a method of accusing a defendant of a crime. The Information will now be read or summarized as follows:

COUNT I

CRIMINAL HOMICIDE, MURDER, a First Degree Felony, at 1953 West California Avenue, in Salt Lake county, State of Utah, on or about December 26, 2007, in violation of Title 76, Chapter 5, Section 201, Utah Code Annotated 1953, as amended, in that the defendant, **Roger Allen Malcolm**, a party to the offense, intentionally or knowingly caused the death of Verne Jenkins; and/or intending to cause serious bodily injury to another, committed an act clearly dangerous to human life that caused the death of Verne Jenkins; and/or acting under circumstances evidencing depraved indifference to human life, engaged in conduct which created a grave risk of death to another, and thereby caused the death of Verne Jenkins.

INSTRUCTION 3

Plea and Burden of Proof

The defendant has entered a plea of not guilty and denies committing these crimes. Every crime has component parts called “elements.” The prosecution must prove each element beyond a reasonable doubt. The defendant does not have to prove anything. He does not have to testify, call witnesses, or present evidence.

INSTRUCTION 4

Proof Beyond a Reasonable Doubt

The prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the prosecution's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION 5

Presumption of Innocence.

The law presumes that the defendant is not guilty of the crimes charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

INSTRUCTION 6

Role of Judge, Jury and Lawyers

All of us are officers of the court and have different roles during the trial:

- As the judge I will supervise the trial, decide legal issues, and instruct you on the law.
- The lawyers will present evidence and try to persuade you to decide the case in one way or the other.
- As the jury, your role is to decide this case based on the law given in the instructions and on the evidence presented in court. Evidence usually consists of the testimony and exhibits presented at trial.

INSTRUCTION 7

Objections

Rules govern what evidence may be presented to you. On the basis of these rules, the lawyers may object to proposed evidence. If I sustain the objection, the proposed evidence will not be allowed. If I overrule the objection, the evidence will be allowed.

Do not evaluate the evidence on the basis of whether objections are made.

INSTRUCTION 8

Order of the Trial

The trial will proceed in the following manner. The prosecution will give its opening statement. An opening statement is an overview of the case from one point of view, and summarizes what that lawyer thinks the evidence will show. Defense counsel will then be given an opportunity to make an opening statement.

The prosecution will then present its evidence. The defendant may then present evidence, though the defendant has no duty to do so. After all of the evidence has been presented, I will give you final instructions on the law you must follow in reaching a verdict. You will then hear closing arguments from the lawyers. The prosecutor will speak first, followed by the defense counsel. Because the government has the burden of proof, the prosecutor is given the opportunity to give the last word. Finally, you will deliberate in the jury room to discuss the case and reach a verdict.

INSTRUCTION 9

Conduct of Jurors

From time to time I will call a recess. During recesses, do not talk about the case with anyone—not family, not friends, nor each other. Until the trial is over, do not mingle or talk with the lawyers, parties, witnesses or anyone else connected with the case. Court clerks or bailiffs can answer general questions, such as the length of breaks or the location of restrooms, but they cannot comment about the case. The goal is to avoid the impression that anyone is trying to influence you improperly. If people involved in the case seem to ignore you outside of court, they are just following this instruction.

Until the trial is over, do not read or listen to any news reports about this case. If you observe anything that seems to violate this instruction, report it immediately to a clerk or bailiff.

INSTRUCTION 10

Note-taking

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

FILED DISTRICT COURT
Third Judicial District

JUN 26 2008

SALT LAKE COUNTY

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ROGER ALLEN MALCOLM

Defendant.

**JURY INSTRUCTIONS:
CLOSING**

Case No.071909592

Judge Paul Maughan

INSTRUCTION 11

Juror Duties

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. In deciding the facts you are not to be influenced by pity or prejudice for or against the defendant. You must not be biased against the defendant because he has been charged with these offenses, or because he has been brought to trial. These facts are not evidence and you are not to speculate from them that the defendant is more likely guilty than not.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. You are to be governed solely by the evidence and the law in these instructions. You are not to be influenced by sentiment, conjecture, sympathy, passion, prejudice, or public feeling. You are to consider and weigh the evidence conscientiously and dispassionately, and apply the law in reaching a just verdict regardless of what the consequences of the verdict may be.

INSTRUCTION 12

Judicial Neutrality

As the judge, I am neutral. If I have said or done anything during the trial that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

INSTRUCTION 13

Lawyers as Advocates

The lawyers are advocates and they represent their respective clients. When they give their closing arguments, keep in mind that they are advocating their views of the case. What they may have said at any time during these proceedings and what they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

INSTRUCTION 14

Evidence

You must base your decision only on the evidence that you saw and heard here in court.

Evidence includes:

- what the witnesses said while they were testifying under oath;
- any exhibits admitted into evidence; and
- stipulations of the parties regarding evidence.

Nothing else is evidence.

In reaching a verdict, consider all the evidence as I have defined it. You may also draw all reasonable inferences from that evidence.

INSTRUCTION 15

Direct/Circumstantial Evidence

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of each—to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

INSTRUCTION 16

Witness Credibility

In deciding this case you will need to decide how believable each witness was. Use your own common sense, good judgment, and experience. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently. Where there is conflicting testimony, it is your duty to reconcile the conflict as far as you can, but you are to determine for yourselves the truth of the case.

INSTRUCTION NO. 17

Defendant Testifying

The defendant testified at trial. Another instruction mentions some things for you to think about in weighing testimony. Consider those same things in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he or she is accused of a crime.

INSTRUCTION 19

Offense Requires Conduct and Mental State

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" OR the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

The prosecution must prove that at the time the defendant acted, he did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state.

INSTRUCTION 19

Inferring the Required Mental State

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

INSTRUCTION 20

Motive

A defendant's "mental state" is not the same as "motive." Motive is why a person does something. Motive is not an element of the crimes charged in this case and does not need to be proven.

However, a motive or lack of motive may help you determine if the defendant did what he is charged with doing. It may also help you determine what his mental state was at the time.

INSTRUCTION 21

Definition of “Intentionally”

A person acts “intentionally” when his conscious objective is to cause a certain result.

INSTRUCTION 22

Definition of “Knowingly”

A person acts “knowingly” or “with knowledge” when the person is aware that his conduct is reasonably certain to cause a particular result.

“Conduct” means either an act or an omission.

INSTRUCTION 23

Definition of “Recklessly”

A person acts “recklessly” when he is aware of a substantial and unjustifiable risk that his conduct will cause a particular result, consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

“Conduct” means either an act or an omission.

INSTRUCTION 24

Definition of Unlawfully

“Unlawfully” means without legal justification.

INSTRUCTION NO. 25

An act committed or an omission made under an ignorance or mistake of fact which disproves the culpable mental state is a defense for that crime.

INSTRUCTION 26

Do Not Consider Punishment

In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide whether the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.

INSTRUCTION NO. 11

Before you can convict the defendant of the crime of Criminal Homicide, Murder, you must find from the evidence, beyond a reasonable doubt, all of the following elements:

1. In Salt Lake County, on or about December 26, 2007, the defendant, Roger Allen Malcolm;
2.
 - a) while acting intentionally or knowingly, or
 - b) while acting with the intent to cause serious bodily injury to the person, committed an act clearly dangerous to human life which, or
 - c) while acting under circumstances evidencing a depraved indifference to human life, he knowingly engaged in conduct which created a grave risk of death to another; and
3. Unlawfully;
4. Caused the death of Verne Jenkins.

If there is a reasonable doubt about any single element, you should find the defendant Not Guilty of Criminal Homicide, Murder.

If, on the other hand, you find all the above elements proven beyond a reasonable doubt, you should then consider whether the defendant caused the death of Verne Jenkins under circumstances which would justify reducing the charge of Murder to Manslaughter.

INSTRUCTION NO. 14

You are instructed that there are two ways in the case before you in which you may find the defendant guilty of Manslaughter instead of Murder in Count I.

Murder may be reduced to Manslaughter if you find that the defendant caused the death of Verne Jenkins under the influence of extreme emotional distress for which there is a reasonable explanation or excuse.

Additionally, Murder may be reduced to Manslaughter where the defendant caused the person's death under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct although the conduct was not legally justifiable or excusable under the existing circumstances.

INSTRUCTION NO. 29

Before you can convict the defendant of the crime of Manslaughter based on extreme emotional distress, you must find from the evidence, beyond a reasonable doubt, all of the following elements:

1. In Salt Lake County, on or about December 26, 2007, the defendant, Roger Allen Malcolm;
2.
 - a) while acting intentionally or knowingly, or
 - b) while acting with the intent to cause serious bodily injury to the person, committed an act clearly dangerous to human life which, or
 - c) while acting under circumstances evidencing a depraved indifference to human life, he knowingly engaged in conduct which created a grave risk of death to another; and
3. Unlawfully caused the death of Verne Jenkins,
4. Under extreme emotional distress and there was a reasonable explanation for the distress.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Manslaughter. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

INSTRUCTION NO. 30

In considering the matter of the affirmative defense of acting under extreme emotional distress for which there is a reasonable explanation as covered in the preceding Instruction, you are instructed that a defendant does not have to establish such defense by any burden of proof. Rather, if there is some evidence which tends to show that the defendant acted under extreme emotional distress, the State must prove beyond a reasonable doubt that the defendant did not act under such extreme emotional distress.

INSTRUCTION NO. 31

Extreme emotional distress does not include a condition resulting from mental illness, or distress that is substantially caused by the defendant's own conduct.

The "extreme emotional distress" must be triggered by something external to the accused, and his reaction to such external stimulus must be reasonable. The terms used must be given the meaning you would give them in common everyday use. Such distress, therefore, cannot have been brought about by the defendant's own peculiar mental processes, or by his own knowing or intentional involvement in a crime.

INSTRUCTION NO. 32

The reasonableness of an explanation or excuse for the stress shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

INSTRUCTION NO. 33

Before you can convict the defendant of the crime of Manslaughter based on imperfect legal justification, you must find from the evidence, beyond a reasonable doubt, all of the following elements:

1. In Salt Lake County, on or about December 26, 2007, the defendant, Roger Allen Malcolm;
2.
 - a) while acting intentionally or knowingly, or
 - b) while acting with the intent to cause serious bodily injury to the person, committed an act clearly dangerous to human life which, or
 - c) while acting under circumstances evidencing a depraved indifference to human life, he knowingly engaged in conduct which created a grave risk of death to another; and
3. Unlawfully caused the death of Verne Jenkins;
4. Under a reasonable belief that the circumstances provided a legal justification or excuse for his conduct;
5. Although the conduct was not legally justifiable or excusable under the existing circumstances.

If, after careful consideration of all of the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant guilty of Manslaughter. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find the defendant not guilty.

INSTRUCTION NO. 34

In considering the matter of the affirmative defense of acting with imperfect legal justification, you are instructed that a defendant does not have to establish such defense by any burden of proof. Rather, if there is some evidence which tends to show that the defendant acted under circumstances where he believed he was entitled to defend himself although under the law he was not entitled to use deadly force, the State must prove beyond a reasonable doubt that the defendant did not act under such circumstances.

INSTRUCTION NO. 35

The reasonableness of the defendant's belief that the circumstances provided a legal justification or excuse for his conduct shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

INSTRUCTION NO. 36

There are several alternative means of arriving at the crime of Manslaughter included in the definition of Manslaughter. You are instructed that you must consider whether the prosecution has proven beyond a reasonable doubt that the defendant committed any of the alternative types of Manslaughter on the date in question. The law requires that all jurors unanimously agree that the prosecution has proven one particular variation of Manslaughter. If all jurors unanimously find beyond a reasonable doubt that the defendant committed a particular type of Manslaughter, you must so indicate by putting an X on the verdict form beside the variation proven. If you are not unanimously convinced beyond a reasonable doubt that the defendant committed one particular type of Manslaughter, you must find Mr. Malcolm not guilty of Manslaughter.

INSTRUCTION NO. 37

If you have a reasonable doubt as to whether Roger Allen Malcolm is guilty of the crime of Criminal Homicide, Murder as charged in the information, you may consider whether he is guilty of the lesser included crime of Negligent Homicide.

However, before you can convict Roger Allen Malcolm of the crime of Criminal Homicide, you must find from all of the evidence and beyond a reasonable doubt, each of the following elements of that offense:

1. In Salt Lake County, on or about December 26, 2007, the defendant, Roger Allen Malcolm;
2. Acted with criminal negligent; and
3. Unlawfully;
4. Caused the death of Verne Jenkins.

If, after careful consideration of all of the evidence in this case, you are convinced that the prosecution has proven each of the foregoing elements beyond a reasonable doubt, then you must find Roger Allen Malcolm guilty of Criminal Negligence. If, on the other hand, you are not convinced beyond a reasonable doubt of any one or more of the foregoing elements, then you must find Roger Allen Malcolm not guilty of that offense.

INSTRUCTION NO. 38

You are instructed that in every crime or public offense, there must be a union or joint operation of the act and the actor's mental state. A person is only guilty of an offense when his conduct is prohibited by law and he acts with the culpable mental state as established by law.

Before a defendant may be found guilty of a crime, the evidence must prove beyond a reasonable doubt that the defendant was prohibited from committing the conduct charged in the information and that the defendant committed such conduct with the culpable mental state required for such offense.

"Conduct" means an act or omission.

"Act" means a voluntary bodily movement and includes speech.

"Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

The term "unlawful" or "unlawfully" means contrary to law or without legal justification.

A person engages in conduct "intentionally," or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

Acting "intentionally" is more than acting "knowingly", "recklessly" or with "criminal negligence."

A person engages in conduct "knowingly," or "with knowledge," with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts "knowingly," or "with knowledge," with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result

A person acts “recklessly” with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

With “criminal negligence,” a person acts with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of or “should have known” of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

INSTRUCTION NO. 39

You may find Roger Allen Malcolm not guilty of any offense, but you may not find him guilty of both Murder and any of the lesser included offenses of Manslaughter or Negligent Homicide. Mr. Malcolm can only be guilty of one crime.

INSTRUCTION NO. 40

(1) A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) A person does not have a duty to retreat from the force or threatened force described in paragraph (1) above if the person is in a place in where he has lawfully entered and remained.

INSTRUCTION NO. 41

A person is not justified in using force if he:

- (a) initially provokes the use of force against himself with the intent to use force as an excuse to inflict bodily harm upon the assailant;
- (b) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or
- (c) was the aggressor.

INSTRUCTION NO. 43

In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

- (a) the nature of the danger;
- (b) the immediacy of the danger;
- (c) the probability that the unlawful force would result in death or serious bodily injury;
- (d) the other's prior violent acts or violent propensities; and
- (e) any patterns of abuse or violence in the parties' relationship.

INSTRUCTION NO. 43

A “forcible felony” includes, among other things, aggravated assault, kidnaping, robbery, burglary. In addition, any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

“Serious bodily injury” means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

INSTRUCTION NO. 44

An aggravated assault can be committed in two manners. It occurs when a person assaults another with such force that serious bodily injury may result or when a weapon is used to carry out the assault.

INSTRUCTION NO. 45

To justify acting in self-defense, it is not necessary that the danger was real, or that the danger was impending and immediate, so long as the defendant acted as a reasonable person in the defendant's position.

INSTRUCTION NO. 46

The right of self-defense exists only as long as the threatened danger would appear to exist to a reasonable person in the defendant's position. When the danger would no longer appear to exist to a reasonable person in the defendant's position, the right to use self-defense ends.

INSTRUCTION NO. 43

You are instructed that in passing on the conduct of the defendant, you should not judge him by the light of after-developed events nor hold him to the same cool and correct judgment which you are able to form, but you should put yourselves in his place and judge his acts by the facts and circumstances by which he was surrounded.

INSTRUCTION NO. 48

You are instructed that conduct which is justified, or is done in self-defense, is a defense to prosecution for any offense based on the conduct.

If you find that Mr. Malcolm was justified in using force in self-defense for any of the above reasons, you should find him not guilty of the charges against him.

INSTRUCTION NO. 49

You are instructed that the laws of Utah do not require a defendant to establish self-defense by a preponderance or greater weight of the evidence. Once the issue of self-defense is raised, whether by the prosecution's witnesses or those of the defense, the prosecution has the burden to prove beyond a reasonable doubt that the act was not done in self defense. The defendant has no particular burden of proof but is entitled to be found not guilty if there is any basis in the evidence from either side sufficient to create a reasonable doubt as to whether he acted in self-defense.

INSTRUCTION NO. 49A

A security guard who is not a certified peace officer has only the same rights and privileges afforded to any ordinary person.

INSTRUCTION 5

Jury Deliberations

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or to just get the case over with. In the end, your vote must be your own.

In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin.

INSTRUCTION 41

Juror Notes Versus Independent Recollection of Evidence

Your notes are only intended to be a help to your memory. They should not take precedence over your own independent recollection of the evidence. Moreover, those jurors who have not taken notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror has taken notes, since the notes are only for the note taker's personal use in refreshing his or her memory of the evidence.

INSTRUCTION NO. 52

When you retire to deliberate, you should appoint one of your number to act as a foreman and to preside over your deliberations. Your verdict(s) must be in writing, signed and dated by your foreman and when found must be returned by you into court. A written form for each of the possible verdicts will be furnished to you.

Regarding Count I in the Information, the verdict in this case must be EITHER:

GUILTY OF MURDER,

or

NOT GUILTY, as your deliberations may result;

OR

GUILTY OF MANSLAUGHTER, because Roger Allen Malcolm acted;

a) Under extreme emotional distress ____; or

b) On imperfect legal justification ____.

OR

NOT GUILTY, as your deliberations may result;

OR

GUILTY OF NEGLIGENT HOMICIDE

or

NOT GUILTY, as your deliberations may result;

This being a criminal case, it requires a unanimous concurrence of all jurors to find a verdict.

When your verdict(s) has/have been found, notify the bailiff that you are ready to report to the Court.

INSTRUCTION 53

Procedure After Reaching a Verdict

Once your deliberations have concluded and the verdict forms have been signed, notify the bailiff that you have reached a verdict without revealing your verdict. The foreperson shall keep the verdict in his or her possession until I instruct you otherwise.

DATED this 25 day of June, 2008.



Judge Paul Maughan
Third Judicial District Court